No. 15,197

United States Court of Appeals

For the Ninth Circuit

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,

Appellant,

vs.

AKIRA MORIMOTO,

Appellee.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

REPLY BRIEF OF HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT.

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This reply brief will be directed only to Point 4 (Statute of Limitations) of appellee's brief.

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1. SECTION 33 SHOULD BE APPLIED AS WRITTEN.

Under his Point 4 appellee argues that the general rule is that a statute of limitations is tolled by war, and that this rule applies to suits against the United

States, citing *Osbourne v. United States,* 164 F. 2d 767 (C.A. 2), and *Marcos v. United States,* 122 Ct. Cl. 641, 106 F. Supp. 172.

But when Congress passes an ordinary statute of limitations for suits based on employers' liability (*Osbourne*) or in the Court of Claims (*Marcos*),[1] it has in mind the conditions and problems of peace time; war is a factor not within the contemplation of such statutes, so it is not unreasonable to read them as subject to an implied exception that they shall be suspended when war makes their application unfair. But the "general rule" as to the tolling of statutes of limitations by war does not express a constitutionally guaranteed right; it is at most a rule of construction, and there is no question but that Congress may, if it deems it advisable, enact a statute of limitations which will not be tolled by war or by the resulting denial of access to the courts, provided only that it leaves open to claimants a reasonable opportunity to assert their rights.

Our position is that that is what Congress did when it enacted Section 33 in 1946 and amended it in 1948, that it enacted a statute of limitations which applied to wartime seizures under a wartime statute, and which was not to be tolled by reason of war or of the conditions resulting from war, such as imprisonment as a prisoner of war.

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[1]We do not rely on any special position of the United States with respect to statutes of limitations in general or on any distinction between "substantive" and "procedural" statutes, such as is mentioned in *Osbourne.*

In 1946 when Congress added the original Section 33 to the Trading with the Enemy Act and in 1948 when it amended it to change the time limits on both claims and suits, the United States was still at war with Japan and Germany, and no one could predict when the treaties of peace would be signed.[2] So when it set April 30, 1949, as one of the time limits on suits, or two years from the date of vesting, as far as Congress could foresee when it enacted and amended Section 33, those time limits might, and probably would, arrive and be passed while a state of war and the conditions resulting from war still continued. The only reasonable conclusion would seem to be that Congress intended the dates it set to govern the filing of claims and of suits notwithstanding the continuance of the war.[3]

What Congress did in Section 33 in 1946 and 1948 was to lay down a rule which would, as far as it could foresee, allow a reasonable opportunity for all claimants to sue, or to file claims even if they were not entitled to sue. And when Congress set the time limits in Section 33 it had before it the fact that there were persons in situations similar to that of the appellee and who, for reasons connected with the war, needed

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[2]In fact the state of war with Germany continued until October 19, 1951, and with Japan until March 20, 1952. Appellant's Opening Brief, p. 16, n. 12.

[3]Appellee seems to argue that Congress did not intend Section 33 to apply to American citizens (Brief, pp. 35-36). There is no trace of any such distinction in the language of Section 33, and it seems impossible that Congress should have intended any such exception without saying so. The language of Section 33 is, "*No* suit pursuant to section 9 may be instituted . . ." (italics added).

additional time to assert their claims. At the same time it wanted to set an over-all limit. In the appendix to this brief we have reprinted the March 25, 1948, letter of Peyton Ford, then The Assistant to the Attorney General, to the Speaker of the House, which was the starting point of the 1948 amendment (App. pp. i-iv). In that letter Mr. Ford pointed out that there were many persons who needed additional time, such as persons in occupied countries, in displaced-person camps, or who, by reason of war conditions, had not been able to become aware of their privileges under the Act. It was with that letter before it that Congress set the time limits on suits of April 30, 1949, or within two years from vesting.[4] The only conclusion possible is that Congress meant those time limits to be applied as written and not to be subject to tolling, and intended that the time limits should apply to persons, like the appellee, who had been cut off from communication by the war, because it was precisely that class of persons who furnished the reason for the 1948 amendment.

On the facts of this case the time limits set by Congress on suits in 1948 were reasonable and proper. The appellee was in a prisoner-of-war camp until December, 1948; then he was in occupied Japan. His right of access to the courts of the United States was restored by April, 1949 (Appellee's Brief, pp. 34-35), and it was in that month that he applied to the United States consulate in Yokohama (R. 49). The time

[4]Significantly, Congress did not extend the time as much as Mr. Ford suggested.

limit of two years from vesting gave him until December 17, 1949, to file his claim and bring his suit, over eight months. That was a reasonable allowance of time and there is no constitutional reason why it should not be applied according to its terms. *Canadian Northern Ry. Co. v. Eggen,* 252 U.S. 553, 562; *McCoskey & Co. v. Eckart,* 164 F. 2d 257, 260 (C.A. 5).

Our position is that Section 33, as amended in 1948, was intended by Congress to be applied without exceptions other than the one exception written into its language, which provides for the exclusion of the time while a claim or suit is pending in computing the two years after vesting. As to the effect of that proviso the appellee appears to misunderstand our position, for he relies on what he says was the holding in *First Nat. Bank of Portland v. McGrath,* 97 F. Supp. 77 (Oregon), that the effect of the proviso is not "simply to add to the two-year period . . . the time *in that period* during which the claim was pending" (italics added). The implication seems to be that our position is that if the appellee filed his claim November 17, 1949, one month before the two-year period ended, he would have obtained by filing only one additional month, or until January 17, 1950, in which to sue. The question is academic, for appellee did not actually file any claim until October 17, 1950 (R. 5), but it may clarify our position for the Court to restate it. Our position is that the timely filing of a claim stops the running of the period for as long as his claim is pending, no matter how long that may be. If ap-

pellee had filed a claim in November, 1949, and if it were still pending, the two-year period, from which the time of pendency is to be excluded, would not have expired yet.[5]

In this connection the appellee makes the surprising assertion (Brief, p. 38), that the *First Nat. Bank* case is the only one counsel has seen which discusses the effect of the proviso in Section 33. The proviso was discussed in *Pass v. McGrath,* 192 F. 2d 415 (C.A. D.C.), from which we quoted on page 15 of our opening brief; in *Cisatlantic Corporation v. Brownell,* 131 F. Supp. 406 (S.D. N.Y.); and in *Grabbe v. Brownell,* 140 F. Supp. 4 (E.D. N.Y.). In the *Cisatlantic* case the Court, as appears from the opinion, in computing the two years, did exclude the time during which the claim was pending.

The net result of those cases is that once the two-year period has expired it will not be re-opened by the later filing of a claim. That is what happened here; the two years from the vesting of appellee's property expired December 17, 1949, and he did not file a claim before October, 1950, at the earliest, or nearly a year after his right to sue had been lost.

In connection with the filing of appellee's claim, he seems to misunderstand the effect of the 1954 amendment to Section 33, which extended for one year from its date the time for filing claims but left unchanged the time limits on filing suits, by April 30, 1949, or two years after vesting, whichever was later.

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[5]In the case cited the claim was filed within the two years, and the holding was that the two-year period was tolled as long as the claim was pending.

The filing of a claim is a condition precedent to suit (*LaDue & Co. v. Brownell,* 220 F. 2d 468 (C.A. 7), certiorari denied, 350 U.S. 823), and the 1950 filing of appellee's claim having been retroactively approved by the amendment, appellee argues that it follows that his suit was also timely (Brief, pp. 37-38). But it does not follow from the fact that a claimant must file a claim before he may sue that every person who files a claim is entitled to sue. The filing of a claim for the return of property under the Act has a dual function; in addition to being a condition precedent to suit under Section 9(a), it is also an application for an administrative and discretionary return under Section 32, which was added to the Act in 1946. The claims of American citizens are to be considered under Section 32, but the primary purpose of that Section was to authorize the return of property to classes of "enemies" who, Congress thought, should get their property back, but who were not entitled to sue under Section 9(a). *Guessefeldt v. McGrath,* 342 U.S. 308, 314-315. So an extension of time for the filing of claims did not imply an extension of time for suits, and the argument that it did was rejected in *Grabbe v. Brownell,* 140 F. Supp. 4 (E.D.N.Y.), and *Pedersen v. Brownell,* 129 F. Supp. 952 (Oregon).

Appellee cites (pp. 34-35) House Report No. 1114, 83d Cong., 2d Sess., dealing with the 1954 amendment. But a reading of that Report discloses that in passing that amendment Congress was occupied with the problems of Section 32, which provides for discretionary administrative returns, and not with Section 9(a). The law is well settled that Section 32 has nothing to do

with suits and that action under it is not subject to judicial review. *McGrath v. Zander,* 177 F. 2d 649 (C.A.D.C.); *Tiedemann v. Brownell,* 222 F. 2d 802 (C.A.D.C.). It follows that there is no implication that because Congress extended the time for filing claims, it meant also to extend the time for suits. As we have seen, in 1954 Congress left unchanged the time limits on suits it had set in 1948. The only possible conclusion would seem to be that it did not intend to change those limits.

We submit that the intention of Congress, as manifested in the 1948 amendment to Section 33, was to bar *all* suits for the recovery of vested property which were not brought by April 30, 1949, or within two years after vesting, whichever was later.

Respectfully submitted,

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December, 1956.

(Appendix Follows.)

Appendix.

Appendix

Department of Justice,
Office of the Assistant to the Attorney General
Washington, March 25, 1948.

The Speaker, the House of Representatives,
Washington, D. C.

My Dear Mr. Speaker:

This Department invites your attention to the desirability of amending section 33 of the Trading With the Enemy Act in order to extend the time for filing claims under sections 9 and 32 of that act.

Section 32 was first enacted in March 1946 (60 Stat. 50). It was amended and section 33 was added in August 1946 (60 Stat. 930; 60 Stat. 925). Both sections were amended in August 1947 (Public Law 370, 80th Cong., 1st sess.).

Section 32 permits return of vested property to any persons save those in certain defined categories hostile to the United States. Among those to whom return is permitted are persons who were enemies under the act only by reason of residence in occupied countries during the war and persons who were persecuted by an enemy government during the war. Section 33 originally provided that claims for return under section 32(a) and section 9(a) must be made within 2 years of the vesting of the property or by August 8, 1948 (2 years from the passage of sec. 33), whichever should be later. In July 1947, Italians were for the first time made eligible to receive returns under sec-

tion 32(a). In order to give Italians the 2 years for filing of claims enjoyed by other claimants, section 33 was amended to permit filing of Italian claims until July 31, 1949.

It now appears that the 2 years allowed for the filing of claims has proved insufficient in the case of many claimants. Until recently, many of the occupied countries have been in a disorganized condition in which communication has been restricted and it has been difficult if not impossible for claimants resident in such countries to file claims. Moreover, many potential claimants have been necessarily preoccupied with the problems of day-to-day existence. The plight of the victims of persecution has been even more arduous. Most of them are presently either in displaced-person camps or dead. Many are presumably unaware of their privileges under the act and, despite the earnest efforts of this Department, will probably continue to be so for some time in the future. Only a very small number of such persons have thus far been able to file claims. The heirs of deceased victims of persecution (who also may file claims under sec. 32), some of whom are American citizens, are in many cases ignorant of the existence of the vested property, or of the fact that they are the heirs, or both. Unless the statute of limitations is extended, the purpose of Congress will be frustrated in many deserving cases.

The proposed amendment would accomplish three main purposes: First, it would extend from August 8, 1948, to July 31, 1949, the statute of limitations on claims filed pursuant to sections 9 and 32 of the act

in cases involving property vested during World War II. In addition, where the August 1948 limiting date on the filing of claims and suits is retained, the date is changed from August 8 to August 9, it having been observed that August 8 falls on Sunday. Second, the statute of limitations governing subsection 9(a) proceedings would be made applicable to all proceedings under section 9. Third, it would simplify section 33. The section is presently embodied in two statutes (60 Stat. 925 and Public Law 370, 80th Cong., 1st sess.), a consequence of separate legislation in respect of Italian-vested property providing, among other things, a different period of limitations for such property than is applicable to other property. The proposed legislation would erase distinctions which the passage of time has made unnecessary and treat all World War II claims uniformly.

The extension of slightly less than a year which is here proposed would do much to alleviate the situation. The filing of stale claims would not be encouraged since, even with the extension, the entire period during which claims might be filed (i.e., from the enactment of sec. 32 to July 31, 1949) would be less than 3½ years.

Section 33 makes no provision for limitations in any proceedings under section 9 except those under subsection (a). This apparently inadvertent omission may have occurred because only subsection (a) has come into sufficiently general play in World War II to command attention. Nevertheless, there may be some claims from World War I under other subsec-

tions of section 9 which are controlled by no statute of limitations at present. While we are confident that such claims, if they exist at all, are not important, it would seem desirable, in the interest of good order, to be able to close the books in respect to such possible claims after the stated time.

A proposed bill to effectuate the foregoing suggestions is enclosed.

The Director of the Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

Peyton Ford,

The Assistant to the Attorney General.